UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: December 6, 1991

FAA Order No. 91-55

In the Matter of:	Docket Nos. CP89**0300
CONTINENTAL AIRLINES, INC.	CP89**0361
	CP89**0362

DECISION AND ORDER

Respondent Continental Airlines, Inc., ("Respondent") has appealed from the oral initial decision issued by Administrative Law Judge Robert L. Barton, Jr., in the above-captioned cases at the consolidated hearing held on June 6, 1991, in * * * .[1/] In his initial decision, the law judge held that Respondent violated Section 108.5(a)(1) of the Federal Aviation Regulations (FAR) (14 C.F.R. § 108.5(a)(1)),[2/] by failing to carry out a provision of the security program which was adopted by Respondent pursuant to that regulation.[3/] For the reasons

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1/ A copy of the law judge's initial decision is attached. A fourth case, CP89**0425, was also heard and decided by the law judge at the consolidated hearing, but that decision was not appealed by either party.

2/ Section 108.5(a)(1) of the FAR provides in pertinent part: "(e)ach certificate holder shall adopt and carry out a security program that meets the requirements of Section 108.7. . ."

3/ Respondent adopted the Air Carrier Standard Security Program which was developed jointly by the Federal Aviation Administration and the air carrier industry. In the Matter of Continental Airlines, FAA Order No. 90-12 at 12 (April 25, 1990).

discussed below, Respondent's appeal is denied, and the initial decision of the law judge is affirmed.[4/]

In the complaints, the Federal Aviation Administration (FAA) ("Complainant"), alleged that on three separate occasions during a four-month period in 1988, Respondent's contract security screeners failed to detect FAA-approved test objects during no-notice FAA tests of screening systems operations at the same airport. Complainant alleged that these failures by Respondent's contract screeners constituted violations of 14 C.F.R. § 108.5(a)(1) in that Respondent had failed to carry out Section XIII.D.1. of its security program. It was further alleged that Section XIII.D.1. of Respondent's security program required Respondent, acting through its employees, contractors and/or agents who perform screening functions, to detect each FAA-approved test object during each screening system operator test conducted by the FAA. Complainant sought civil penalties of $1000 in CP89**0361, and of $10,000 in both CP89**0300 and CP89**0362.

In his initial decision, the law judge found that Respondent violated Section 108.5(a)(1) as alleged in the complaints. The law judge affirmed the $1,000 and $10,000 civil penalties sought by Complainant respectively in

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4/ The law judge sealed the consolidated hearing record in this case. Portions of this decision have been redacted for security reasons, pursuant to 14 C.F.R. Part 191. All unredacted copies of this decision must be treated in a confidential manner. Unredacted copies of this decision may not be disseminated beyond the parties to this proceeding and those carriers bound by the Standard Security Program, all of whom have been given unredacted and redacted copies.

CP89**0361 and CP89**0362, and reduced the $10,000 civil penalty sought by Complainant in CP89**0300 to $7,500.

On appeal, Respondent argues that no civil penalty may be imposed on it for its failure to comply with a provision of its security program requiring it to detect all FAA-approved test objects because its security program is not a regulation. Respondent notes that neither Section 108.5(a) nor Section 108.7, to which Section 108.5(a) refers, expressly requires that a carrier pass FAA tests of security screening operations, or that it include such a requirement in its security program. Respondent argues that in In the Matter of Continental Airlines, FAA Order No. 90-12 (April 25, 1990), the Administrator misinterpreted Section 108.5(a) by focusing on the "adopt and carry out" language of Section 108.5(a)(1) to the exclusion of the remainder of that phrase, "a security program that meets the requirements of § 108.7." Respondent argues that it cannot be subject to a civil penalty for failing to detect test objects because Section 108.7 does not specifically require that security programs contain any provisions regarding the testing of security screening operations. The FAA, according to Respondent, has not exercised its authority to promulgate regulations on testing, and since Respondent's own security program has no regulatory effect, Respondent's failure to carry out Section XIII.D.1. of its security program did not constitute a violation of a regulation. Respondent argues further that in FAA Order No. 90-12, the Administrator incorrectly assumed that Respondent's security program had been incorporated by reference into

Section 108.5(a). Respondent contrasts the language of Section 108.5(a) to that of Section 108.5(b), which Respondent argues does appear to provide for an incorporation by reference.

Complainant, in its Reply Brief, reiterates its position that Respondent's failure to carry out the provision of its security program requiring it to detect test objects during FAA screening systems tests constitutes a violation of 14 C.F.R. § 108.5(a)(1). Complainant states that Respondent's arguments in this appeal have already been considered and rejected by the Administrator in previous cases, many involving this Respondent. According to Complainant, in those previous cases the Administrator determined that a carrier that fails to implement the provisions of its security program violates Section 108.5(a)(1).

Respondent has previously raised these arguments in other civil penalty cases, and these arguments have been considered and rejected. In the Matter of Continental Airlines, FAA Order No. 91-9 (April 12, 1991); In the Matter of Continental Airlines, FAA Order No. 90-19 (November 7, 1990); In the Matter of Continental Airlines, FAA Order No. 90-18 (August 22, 1990); In the Matter of Continental Airlines, FAA Order No.90-12 (April 25, 1990). In light of the fact that there are no new issues in the instant cases and that the facts of these cases have not been distinguished in any way from the prior cases cited herein, Respondent's appeal is denied. FAA Order No. 90-12, FAA Order No. 90-18, and FAA Order No. 90-19 should be consulted for a discussion of the issues raised by Respondent in the instant appeal.

Therefore, in light of the foregoing, Respondent's appeal is denied and the law judge's initial decision is affirmed. Civil penalties in the following amounts are hereby assessed:[5/]

1. In Docket No. CP89**0300, $7,500;
2. In Docket No. CP89**0361, $1,000; and
3. In Docket No. CP89**0362, $10,000.

JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 15 day of November, 1991.

5/ Unless Respondent files a petition for judicial review within 60 days of service of this decision (pursuant to 49 U.S.C. App. § 1486), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2)).